FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 4 1959
JAMES R. BROWNING, Clerk

Nos. 817, 770 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE AMERICAN OIL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA AND THE HONORABLE JOHN J. SIRICA, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND ON MOTION FOR LEAVE TO FILE A PETITION FOR AN EXTRAORDINARY WRIT TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
WALTER B. ASH,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Argument	5
Conclusion	11

CITATIONS

Cases:	
Fourco Glass Co. v. *Transmirra Corp.*, 353 U.S. 222	9
Willis v. *United States*, 99 F. 2d 362	10
Statutes:	
Act of August 30, 1890, 26 Stat. 837	6, 7
Act of June 6, 1924, 43 Stat. 463, 40 U.S.C. 72	7, 8, 9
Section 2	6, 9
Act of March 1, 1929, 45 Stat. 1415, 16 D.C. Code 619–644	2–4, 7, 8
Section 1	2, 6
Section 10	3, 7
Act of July 19, 1952, 66 Stat. 781	9
All-Writs Statute, 28 U.S.C. 1651(a)	5, 11
Interlocutory Appeals Act of September 2, 1958, 72 Stat. 1770, 28 U.S.C. 1292(b)	5
Miscellaneous:	
69 Cong. Rec. 10748	8
H. Rep. 1693, 70th Cong., 1st Sess.	8
S. Rep. 1431, 70th Cong., 2d Sess.	8

In the Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 817, 770 Misc.

THE AMERICAN OIL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA AND THE HONORABLE JOHN J. SIRICA, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND ON MOTION FOR LEAVE TO FILE A PETITION FOR AN EXTRAORDINARY WRIT TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 2a–8a) is not reported. The *per curiam* order of the court of appeals (Pet. 1a) is not reported.

JURISDICTION

The order of the court of appeals was entered on February 6, 1959 (Pet. 1a). The petition for a writ of certiorari (No. 817) and the motion for leave to file petition for extraordinary writ (No. 770, Misc.) were filed on April 6, 1959. The jurisdiction of this

Court is invoked under 28 U.S.C. 1254(1) and the All-Writs Statute, 28 U.S.C. 1651(a).

QUESTION PRESENTED

Whether the Act of March 1, 1929 (45 Stat. 1415, 16 D.C. Code 619–644), which authorizes orders for possession to be entered upon declarations of taking in condemnation actions brought by the United States to acquire land in the District of Columbia, applies to a condemnation action brought by the United States on behalf of the National Capital Planning Commission.

STATUTES INVOLVED

The Act of March 1, 1929, 45 Stat. 1415, 16 D.C. Code 619–644, provides in part as follows:

> SEC. 1. Whenever the head of any executive department or independent bureau, or other officer of the United States, or any board or commission of the United States, hereinafter referred to as the acquiring authority, has been, or hereafter shall be, authorized by law to acquire real property in the District of Columbia for the construction of any public building or work, or for parks, parkways, public playgrounds, or any other public purpose, such acquiring authority shall be, and hereby is, authorized to acquire the same in the name of the United States by condemnation under judicial process whenever in the opinion of such acquiring authority it is necessary or advantageous so to do; and in every such case the Attorney General of the United States, upon the request of such acquiring authority, shall cause a proceeding in rem for such condemnation to be instituted in the District Court

of the United States for the District of Columbia, holding a special term as a District Court of the United States, which court is hereby vested with jurisdiction of all such cases of condemnation with full power to hear and determine all issues of law and fact that may arise in the same.

* * * * *

SEC. 10. The petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. * * *

* * * * *

Upon the filing of said declaration of taking and of the deposit in the registry of the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment;

but interest shall not be allowed on so much thereof as shall have been paid into the registry. * * *

* * * * * *

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. * * *

Other relevant statutes are set forth in Appendix B to the petition for certiorari.

STATEMENT

On October 9, 1958, the United States, on behalf of the National Capital Planning Commission, filed a complaint and a declaration of taking[1] in a condemnation action in the United States District Court for the District of Columbia to acquire certain property, improved by a gasoline service station, located at the southeast corner of Wisconsin and Massachusetts Avenues in Washington, D.C. (R. 1). Upon the Government's motion, the court ordered delivery of possession on January 15, 1959, but the order, subsequently extended (Misc. Pet. 1a–3a, 11a), has been stayed pending disposition of the petition for a writ of certiorari (Misc. Pet. 12a).

By its answer, petitioner challenged the validity of the order for delivery of possession, contending that the declaration-of-taking procedure was not available to the Planning Commission. On motion of the Government, the court granted summary judgment on that issue in its favor (Misc. Pet. 4a, 5a–10a). The issue

[1] Accompanied by a deposit of estimated just compensation.

of just compensation for the taking has not yet been tried.

The district court refused to certify its order sustaining the order for possession as one appropriate for immediate appeal under the Interlocutory Appeals Act of September 2, 1958, 72 Stat. 1770, 28 U.S.C. 1292(b) (R. 65). Petitioner then sought review of that order in the court of appeals by a petition for an extraordinary writ under the All-Writs Statute, 28 U.S.C. 1651(a). The court of appeals, after hearing oral argument, denied the petition by a *per curiam* order (Pet. 1a).

ARGUMENT

In this Court, petitioner seeks review by certiorari of the court of appeals' judgment denying an extraordinary writ (No. 817) or, alternatively, the issuance of an original writ by this Court (No. 770, Misc.). Our response is mainly confined to the contents of the petition for a writ of certiorari in No. 817. Any relief to which petitioner might be entitled can be fully granted by a review of the judgment of the court of appeals. There is no necessity for invoking the original process of this Court.

1. Petitioner does not challenge the right of the United States to condemn its property. It contends only that the declaration-of-taking procedure, whereby immediate possession can be obtained, was not available and hence that possession could be awarded only upon conclusion of the entire condemnation proceedings, including the determination of just compensation. That contention is without substance.

a. The Planning Commission was created in 1924. At that time, the Act of August 30, 1890, 26 Stat. 412, 413, prescribed the procedure to be followed "hereafter, in all cases of the taking of property in the District of Columbia for public use, whether herein, heretofore, or hereafter authorized" (Pet. 9a–12a). Accordingly, when the Planning Commission was created in 1924 and given authority to acquire property in the District of Columbia and elsewhere, it was authorized to acquire such property "by condemnation proceedings, such proceedings to acquire land within the District of Columbia to be in accordance with the provisions of act August 30, 1890" (§ 2, Act of June 6, 1924, 43 Stat. 463, 40 U.S.C. 72; Pet. 9a).

The 1890 Act did not contain a declaration-of-taking procedure. In 1929, however, Congress provided a new procedure for the condemnation of lands within the District of Columbia. Section 1 of the 1929 Act provided (Act of March 1, 1929, 45 Stat. 1415, 16 D.C. Code 619; *supra*, pp. 2–3):

> Whenever the head of any executive department * * *, or any board or commission of the United States * * * has been, or hereafter shall be, authorized by law to acquire real property in the District of Columbia * * * for parks, parkways, public playgrounds or any other public purpose, such acquiring authority shall be, and hereby is, authorized to acquire the same in the name of the United States by condemnation under judicial process * * *; and in every such case the Attorney General of

> the United States, upon the request of such acquiring authority, shall cause a proceeding in rem for such condemnation to be instituted * * *.

In addition to requiring such suits to be brought in the name of the United States, the Act made numerous changes from the procedure previously followed in such cases, including, for example, the creation of a right to jury trial on the issue of just compensation. In particular, § 10 of the Act expressly authorized the filing of a declaration of taking and empowered the court, upon the filing of such a declaration, to fix the time for delivery of possession (*supra*, pp. 3–4). It is the applicability of that power that is in issue here.

Strictly speaking, the issue is not whether the 1929 Act "repealed" the 1890 Act or "amended" the reference to that Act in the 1924 Act. Petitioner's contention that the 1924 Act was in no way modified by the 1929 Act would mean only that the Planning Commission is still empowered by the 1924 Act to initiate condemnation actions pursuant to the 1890 procedures; it would not follow that the 1929 Act procedures were not also available. Here, the action was brought in the name of the United States under the 1929 Act, and thus the precise issue is simply whether that Act is applicable at all to condemnation actions brought on behalf of the Planning Commission. Petitioner's technical objections that the 1929 Act failed expressly to repeal the 1890 Act

or amend the 1924 Act—though clearly without merit in any event—are therefore irrelevant.

There can be no doubt, we believe, that the 1929 Act does indeed apply to actions on behalf of the Planning Commission. Patently the Planning Commission is a "commission of the United States * * * [which] has been * * * authorized by law to acquire real property in the District of Columbia * * * for parks." Petitioner does not seriously contend otherwise, and it is difficult, in fact, to understand to whom that language might refer other than the Planning Commission. Nor is that conclusion surprising, since the Act was in fact drafted, in cooperation with the Justice Department, by the Planning Commission. 69 Cong. Rec. 10748.[2]

Since the 1929 Act itself independently authorizes condemnation proceedings in the name of the United States on behalf of the Planning Commission if the Commission "has been * * * authorized by law to acquire" such property, the only relevance of the 1924 Act is to establish the substantive authority of the Commission to "acquire" property. It is essentially irrelevant whether the 1924 Act also authorizes some other procedure for the acquisition. To the extent

[2] See also H. Rep. 1693, 70th Cong., 1st Sess., p. 2; S. Rep. 1431, 70th Cong., 2d Sess., p. 2:

"Proceedings for condemnation of land in this District for uses of the United States Government for construction of public buildings and *extension of the park and playground system of the National Capital*, have long been unsatisfactory in the matter of time occupied and for many other reasons. It is believed that this bill will, in the particulars hereinafter described, be of very material advantage." [Emphasis added.]

that the two Acts are inconsistent in their procedural provisions, the later Act necessarily controls.[3]

b. The issue, moreover, concerns solely the procedure to be followed in a limited class of condemnation proceedings (those on behalf of the Planning Commission) in the District of Columbia, and is thus an essentially "local" question appropriate for final resolution by the Court of Appeals for the District of Columbia. That court resolved this very question over 20 years ago in *Willis* v. *United States*, 99 F. 2d 362, holding the jury trial provisions of the 1929 Act (rather than the commissioner procedure of the 1890 Act) to be applicable to condemnation proceedings brought by the United States on behalf of the Planning Commission.[4] That decision, which petitioner fails to mention, has been the controlling law in the District for 20 years. This case, which challenges that decision for the first time, clearly presents no question appropriate for review by this Court.

2. The second question presented (Pet. 2, 10–12) goes to the jurisdiction of the court of appeals to issue an extraordinary writ in the circumstances of this case, and assumes (without discussion) that the

---

[3] Petitioner's contention that § 2 of the 1924 Act was reenacted when it was re-numbered as § 11 during the revision of the National Capital Planning Act in 1952 (66 Stat. 781), and hence now supersedes the 1929 Act, is frivolous. Such a formal reenactment as part of a general revision has no substantive effect. See, *e.g.*, *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 227.

[4] Although not expressly disclosed by the report of the case, the record before the court of appeals in *Willis* stated (pp. 1-2) that the case was filed "at the request of the National Capital Park and Planning Commission".

court of appeals held that it was without jurisdiction. There is nothing to indicate that the court so held, and the evidence is to the contrary. The court did not in form dismiss the petition for lack of jurisdiction. Rather, after hearing oral argument, it "denied" the petition with no indication that its action was on other than the merits. While the *per curiam* order is not explicit, we think the circumstance that the issue raised was long ago settled by the same court in the *Willis* case and in any event without substance indicates that the petition was denied simply because of its lack of merit. Whatever the basis of the court of appeals' order, however, the obvious lack of substance to petitioner's argument on the merits makes this case an inappropriate vehicle to consider the scope of the All-Writs Statute, 28 U.S.C. 1651(a).

CONCLUSION

For the foregoing reasons, both the petition for a writ of certiorari (No. 817) and the motion for leave to file a petition for an extraordinary writ (No. 770, Misc.) should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
WALTER B. ASH,
Attorneys.

MAY 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959